In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 440

UNITED STATES OF AMERICA,
Petitioner,
vs.
UTAH CONSTRUCTION AND MINING CO.,
Respondent.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Respondent believes that the issues involved in this proceeding and the questions presented may be stated more aptly and pointedly than is done by Petitioner in its "Brief for United States".

The following is respondent's view of the Questions Presented:

1. Is one who asserts a claim for breach of contract in the Court of Claims entitled to a determination of the facts in a judicial trial that is plenary in nature and

broad enough in scope to allow for the over-lapping and interrelationship of the series of items constituting the claim?

2. Does the "Disputes Article" of standard Government contracts require that all factual matters connected with the contract, regardless of the nature of the claim, must be tried and determined only by the administrative process?

STATEMENT OF THE CASE

Petitioner professes to set forth in its Brief a statement of the "Background," of the "Administrative Claims and Proceedings" and of the "Proceedings in the Court of Claims" sufficient to convey to this Court an understanding of the nature and scope of the administrative proceedings, of the manner in which the vital issues were processed and the record developed, and of the relationship of the administrative proceedings and their record to the pending proceeding in the Court of Claims. (Brief for U.S., pp. 6-14).

Strangely, that statement is completely devoid of any recital of the details of the manner in which the vital issues which are now the subject of this proceeding—the "breach of contract" phase of respondent's claims—were processed and disposed of administratively.

There is not one single word or sentence in Petitioner's statement that explains or sets forth how or in what manner the vital issue of the "breach of contract" aspects of respondent's series of administrative claims were considered and disposed of.

To rectify this glaring deficiency we will undertake to demonstrate, by the use of a few uncontradictable examples, that, at every level of the administrative process, there was an absolute and flat refusal to consider, hear or determine the "breach of contract" phase of respondent's claims. Uniformly they were rejected by sustaining objections, by granting motions to dismiss, and by a complete disclaimer of any jurisdiction to entertain them under the "Disputes Article" of the contract.

This refusal to hear, consider or determine the "breach of contract" aspects of the administrative claims was a uniform policy carried out by:

(1) the contracting officer;

(2) the counsel for the Government; and

(3) the Advisory Board on Contract Appeals.

I. PETITIONER'S CONTENTION THAT THE ADMINISTRATIVE PROCEEDINGS WERE "FULL DRESS ADVERSARY PROCEEDINGS" IS PATENTLY UNTRUE AS TO THE VITAL ISSUES, SINCE AT EVERY LEVEL OF THE ADMINISTRATIVE PROCESS THERE WAS A COMPLETE DISCLAIMER OF JURISDICTION TO CONSIDER THE "BREACH OF CONCONTRACT" PHASE OF RESPONDENT'S CLAIMS UNDER THE "DISPUTES ARTICLE."

The Petitioner's Brief sets forth its own description and characterization of the administrative proceedings involved in this case in its "Administrative Claims and Proceeding" (Brief for U.S., pp. 7-10). It purports to summarize the tone and atmosphere of the administrative hearings in the following terms:

> "The Board heard each matter in a *full-dress adversary proceeding,* with testimony, cross-examination, exhibits, briefs and argument. Where appropriate, the Board also viewed the construction site (R. 80-81, 102-103, 129). In regard to each matter, the Board ruled that its jurisdiction was clear and it rendered decisions, *with full discussion and findings* (R. 80, 102, 128; 78-93, 101-120, 127-137)."* (at p. 9.)

Again, in relating the administrative procedure that disposed of the "Pier Drilling Claim," Petitioner states (at p. 19 of Brief for U.S.):

> "The Board found, after a *full-scale adversary hearing,* that respondent had in fact encountered subsurface float rock constituting a changed condition within the meaning of Article 4."

Petitioner's ready reference to and heavy emphasis upon the *"full-dress"* and *"full-scale"* proportions of the "adversary proceedings" seems intended to allay any fear, and even any question, about the true nature and scope of the administrative proceedings before the Atomic Energy Commission's "Advisory Board on Contract Appeals."

Petitioner would fortify its contention that the administrative hearings were indeed "full-dress" and "full-scale" adversary proceedings by certifying that "in regard to each matter *the Board ruled that its jurisdiction was clear* and it rendered decisions with full discussion and findings". (Brief for U.S., p. 9)

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*Throughout this brief, emphasis ours unless otherwise noted.

In view of these strong and reassuring representations as to the adequacy of the nature and scope of the administrative proceedings, it is strange that neither in its "Administrative Claims and Proceedings" nor anywhere else in Petitioner's Brief is there any accurate portrayal of the specific manner in which the controversial and vital issues raised by respondent's claims, and which are now before this Court, were discussed, considered and disposed of in the administrative hearings.

Admittedly, the crux of the important controversy presented by this case arose out of the "breach of contract" phase of respondent's Petition before the Court of Claims (R., pp. 4-14). Clearly, the problem to be decided by this Court is the proper method of considering and adjudicating the "breach of contract" aspects of the present claim as they are related to the "Disputes Clause" of the contract.

Yet, nowhere in Petitioner's Brief is there any statement of how, or whether this phase of respondent's present claim was considered and disposed of by the Advisory Board on Contract Appeals.

This deficiency in Petitioner's Brief is of the utmost significance. The complete omission of any discussion of this phase of the claim is obviously intentional and purposeful.

That is particularly true since there was discussion, consideration and decisional action on this controversial "breach of contract" phase of the claim at every stage of the administrative process. In each instance it was significant, meaningful discussion that was had and dispositive action that was taken.

A. The Contracting Officer's Decisions Determined That Claims for Damages for Breach of Contract Were Not Properly Before Him for Decision Under the Disputes Article.

A typical instance of the manner in which the "breach of contract" phase of the present claim arose and was disposed of during the administrative consideration of respondent's series of claims for equitable adjustment is found in the instance of the "Concrete Aggregate Claim."

In the presentation of that individual claim, the status in the administrative procedure of a claim for "damages for an alleged breach of contract" was first raised at the Contracting Officer's level. In his decision on the "Concrete Aggregate Claim" the Manager of the Idaho Operations Office, who was the Contracting Officer, made this pertinent Finding (R. p. 53):

> "3. *The Contractor's July 16, 1956 claim for additional compensation* is predicated on a failure of the Commission to make available suitable concrete aggregate in accordance with the provisions of SC-18 of the contract and *is therefore a claim for damages for an alleged breach of contract by the Commission which is not properly before me for consideration under the Disputes Article.*"

Consistently with that Finding, in his "Determination" (which was the Contracting Officer's Decision on this claim) he ruled (R., p. 56):

> "DETERMINATION
>
> As previously stated, *it is my determination that your July 16, 1956 claim is a claim for damages for breach of contract which is not properly before me for consideration under the Disputes Article.*"

This example typifies the manner in which, at the Contracting Officer's level, any claim for damages for breach of contract was disposed of.

The Contracting Officer's position, as bluntly stated in every such instance, was that "a claim for damages for an alleged breach of contract by the Commission" was not properly before him for consideration under the "Disputes Article" and would not be heard or considered by him.

It cannot be contradicted that, at all times during the administrative proceedings, the Contracting Officer (who was the first decision making representative of the Government) asserted the legal position that the "breach of contract" phase of the various claims did not involve "disputes concerning questions of fact arising under this contract" and therefore could not be considered by him or processed under the "Disputes Article."

B. Counsel for the Government Contended in Formal Written Motions, by Oral Objections and in Documented Briefs That Claims for Damages for Breach of Contract Could Not Be Considered Under the Disputes Article.

The record of the processing of the "Concrete Aggregate Claim" also serves to demonstrate the manner in which counsel for the Government viewed and treated the "breach of contract" aspect of respondent's claims during the administrative hearings.

At that stage of the proceedings counsel for the Government were the "Attorneys for the Contracting Officer, USAEC, Idaho Operations Office, Idaho Falls, Idaho."

Counsel for the Government filed in that proceeding a "Motion to Dismiss for Lack of Jurisdiction." This motion was based solely upon their contention that the "Concrete Aggregate Claim" was in fact a "claim for damages for breach of contract."

The legal position then taken by the Government is so directly in conflict with that now being asserted before this Court by Government counsel that we quote the pertinent language of that Motion verbatim:

> "The Contracting Officer . . . moves to dismiss for lack of jurisdiction the appeal of Utah Construction Company . . . for the reasons that:
>
> 1. The Contractor's claim is a claim for damages for breach of contract or breach of warranty.
>
> 2. The disputes clause of the subject contract limits the Hearing Examiner's jurisdiction to disputes 'concerning questions of fact arising under this contract'.
>
> 3. A claim for damages for breach of contract or breach of warranty is not a dispute concerning a question of fact arising under the contract.
>
> 4. The Contractor's claim may not be recognized as a claim for an equitable adjustment pursuant to Article 4. ('Changed Conditions') of the subject contract."

So that there might be no minimization of the staggering conflict and inconsistency in legal position between that asserted by the Government's counsel during the administrative hearings and that now being urged, we append a photostatic copy of the pertinent portions of the "Motion to Dismiss for Lack of Jurisdiction" to this brief. (infra, Appendix).

The Government cannot challenge respondent's assertion that throughout the entire gamut of the administrative procedure counsel for the Government contended by formal written motion, by oral objection, and in documented briefs that "claims for damages for breach of contract are not disputes concerning questions of fact arising under the contract and therefore cannot be considered under the Disputes Article."

C. The Advisory Board on Contract Appeals Consistently Ruled that It Was Without Authority to Consider or Determine Claims for Damages for Breach of Contract.

The Atomic Energy Commission's Advisory Board on Contract Appeals never wavered in its belief that it lacked jurisdiction to award general damages on claims for alleged breaches of contract. Its disclaimer of such jurisdiction was expressed in a controversy involving directly the contract which is the subject of this litigation. The decision referred to is the one entitled *Appeal of Utah Construction Company* (Docket No. 91) where the Board stated:

> "It is clear, in the light of the Board's decision in Appeal of Claremont Construction Company (Docket No. 64), that, not only does the *Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter 'relating to' and not one 'arising under' the contract.* The Board has discussed this distinction at length in both that Claremont case and in Appeal of Frontier Drilling Company (Docket No. 74). The reasoning need not be repeated here. *As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.*"

This view was consistently enforced by the Board in the hearings on the series of claims which are the subject of this case. It was made manifest both in rulings on formal motions and on oral objections interposed when offers of proof were made.

It must be conceded, then, that the final, considered legal position of the Advisory Board on Contract Appeals was consistent with those of the Contracting Officer and counsel for the Government. Claims for damages because of alleged breaches of contract were not considered since they were not recognized as involving disputes concerning questions of fact arising under the respective contracts.

• • • • •

Another deficiency, or at least an inadequacy, of the "Brief for United States" is the failure of Petitioner to set forth any true picture or characterization of the nature of Respondent's Petition before the Court of Claims. This we believe to be basic to an understanding of the issues presented by this proceeding.

In the absence of any analysis or description of the nature and scope of that Petition in the "Brief for United States" we deem it essential to set forth at this point the following introductory characterization of respondent's basic pleading.

II. PETITIONER'S EFFORT TO CHARACTERIZE RESPONDENT'S PETITION IN THE COURT OF CLAIMS AS SIMPLY A RESTATEMENT OF ITS SERIES OF ADMINISTRATIVE CLAIMS IS IMPROPER AND UNFAIR, SINCE THE PETITION STATES A SINGLE, CUMULATIVE CLAIM FOR DAMAGES FOR BREACH OF CONTRACT.

In Petitioner's statement of the "Proceedings in the Court of Claims" (Brief for U.S., pp. 11-14) it persists in its effort to characterize respondent's Petition in the Court of Claims as simply a restatement of the series of five separate and independent claims as to which some basic facts have already been determined in administrative hearings. On this point it contends that:

> "Respondent alleged substantially the same basic facts as those underlying its administrative pier drilling, shield window, shield door, and concrete aggregate claims." (at p. 11)

Properly, respondent's Petition is to be viewed as the statement of one single, cumulative claim for damages for breach of contract, rather than as a severable restatement of the series of individual claims presented before the administrative board. Respondent has not pleaded separate claims or a series of breaches of contract, but has spelled out the details of the series of acts and omissions which cumulatively constituted a breach of contract on the part of the Government for which it should respond in damages.

The charging allegations are contained in paragraphs 4 and 6 of the Petition (R., pp. 3-4). Paragraph 6 states, in part:

> "6. As a result of plaintiff's detrimental reliance on said defendant's delays, misrepresentations and failures to perform in accordance with said contract

and its implied and express warranties, *including, but not limited to, the acts of defendant with respect to major phases of said contract, hereinafter referred to, which independently and cumulatively constituted a breach of contract by defendant (sub-paragraphs 7(a), (b), (c), (d) and (e) herein).*"

This point is to be emphasized, since the nature of the argument will point up the important legal implications of respondent's action in pleading a single, non-fragmented, non-segmented claim before the Court of Claims, in an effort to obtain for the first time a full and complete hearing in which all of its evidence may be heard and weighed simultaneously by a tribunal which is not restricted by artificial jurisdictional limits or by limitations based upon the sequence or narrow proximity of the time in which a series of legal rights were created by factual occurrences.

A. Respondent's Petition in the Court of Claims Does Not Seek a Review of Any Administrative Determination.

At various points in the "Brief for United States" Petitioner refers to respondent's Petition before the Court of Claims so as to convey the impression that the Petition seeks a *review* of the administrative decisions on respondent's series of claims for equitable adjustments.

This is not a fair representation or interpretation of either the Petition or the relief sought. Nowhere in the Petition is there any reference to or request for a *review* of any administrative decision.

Petitioner is confused and therefore misleads when it incorporates in its Brief statements such as this one:

> "When respondent later asserted a claim for breach of contract in the Court of Claims based upon damages allegedly caused by construction delays resulting from the same changed conditions, respondent was not entitled to a second evidentiary hearing relating to the issue of whether construction delays had occurred. Under the disputes clause and the Wunderlich Act, this issue had been finally decided administratively *subject only to judicial review* for fraud or arbitrariness or for lack of substantial evidentiary support. *Such limited review*, under the *Bianchi* decision, 'must rest solely on consideration of the record before the department' (373 U.S. at 714). The Court of Claims decision ordering a judicial trial *de novo* on this class of issues was therefore error." (Brief for U.S., p. 23)

Respondent's Petition is an independent, direct application to the courts, specifically the Court of Claims, for damages for a breach of the contract. The Petition is not stated in terms of a review of administrative decisions, nor does it seek one.

This direct and independent application to the courts was, of course, based upon the fundamental legal position that actions for damages for breach of contract were not subject to the "Disputes Article" of the contract.

SUMMARY OF ARGUMENT

Petitioner's present contention before this Court that claims for "breach of contract" are disputes concerning questions of fact arising under the contract within the meaning of the standard "Disputes Article" is an out-

right repudiation of the position taken at every stage of the administrative proceedings by every representative of the Government: (1) contracting officer; (2) counsel for the Government; and (3) the Advisory Board on Contract Appeals of the Atomic Energy Commission (see photostatic copy of the Government's "Motion to Dismiss for Lack of Jurisdiction", Appendix, *infra.*)

The rigid time limitations imposed by the pertinent contract clauses on "Changes", "Changed Conditions" and "Delays—Damages" require a contractor to file a written claim within a very few days after the happening of any occurrence that gives rise to a right under those clauses. Consequently a long series of separate, individual claims may be filed by a contractor in the course of the performance of a single Government contract.

The result is the breaking down of a claim that normally would be presented as one single cause of action in court litigation, into a series of finely-segmented, highly-fragmented individual claims. In the administrative process each segmented claim is considered and determined separately, without any relationship to or joint consideration with any other claim.

Respondent's Petition before the Court of Claims alleges one single cumulative claim for breach of contract, not a series of severable claims.

A contractor who has filed and presents to the Court of Claims a claim for breach of contract is entitled to have the facts of his claim heard and determined in an atmosphere and under a hearing concept that is broad enough in scope to encompass all phases and items of his

claim, including the most important element of providing for the consideration of the overlapping and close interrelationship of the various items making up the claim.

The proposal of Petitioner that the factual issues pertinent to a claim for damages for breach of contract be determined within the narrowly restricted context of the finely-segmented administrative hearing would provide an unsuitable and inadequate hearing. Such a procedure would deny to the contractor alleging the claim for breach of contract that full and fair hearing which is essential to due process of law.

Respondent raises the issue of the denial of due process of law because of Petitioner's effort to compel it to present its "breach of contract" claim in the procedural straitjacket of the finely-segmented, highly-fragmented administrative hearing.

* * * * *

The "Delays-Damages clause" of the standard Government contract does not provide either an "equitable adjustment" or compensation for "any increase of cost." Consequently, a contractor who asserts that he has incurred unexpected additional costs because of Government-caused delays is compelled to sue in the Federal courts for unliquidated damages arising out of the breach of contract by the Government. The "Disputes Article" of the contract is not available for such claims.

Respondent's Petition before the Court of Claims *is not a request for a review* of any administrative decision. It is a direct and independent application to the Court of Claims for unliquidated damages for an alleged breach of contract.

A review of the administrative practice discloses that generally the administrative boards—including the Atomic Energy Commission's Advisory Board on Contract Appeals—have recognized the distinction between disputes "arising under" the contract and those which are "connected with, but do not arise under" the contract. The administrative boards have conceded that claims for breach of contract have not been committed to agency decision under the "Disputes Article."

The Court of Claims, in its ruling in this litigation, stressed that the basis of its decision with respect to respondent's claim was a clear recognition of the delineation between disputed questions "arising under" the contract and those "which are connected with, but do not arise under" it.

Petitioner has failed to cite any persuasive reason for reversing the whole history of interpreting the "Disputes Article" of the contract.

Respondent's position before this Court with respect to the application of the *Bianchi* decision to the present litigation is the same as it was before both the Commissioner and the Court of Claims, namely: that the *Bianchi* decision must be interpreted as having recognized by its express terms the distinction between "matters within the scope of the 'disputes clause' " and those which are not subject to it.

ARGUMENT

I. ONE WHO ASSERTS A CLAIM FOR BREACH OF CONTRACT IS ENTITLED TO A JUDICIAL DETERMINATION OF THE FACTS IN A PLENARY HEARING BROAD ENOUGH IN SCOPE TO ALLOW FOR THE OVERLAPPING AND INTERRELATIONSHIP OF THE SERIES OF ITEMS CONSTITUTING THE CLAIM: SHORT OF THAT, HE IS DENIED DUE PROCESS OF LAW.

A. The Rigid Time Limitations Upon the Filing of Claims for "Changes", "Changed Conditions," and "Delays-Damages" Produce a Series of Separate Individual Claims Under a Single Contract.

This proceeding involves a consideration of only four of the articles or clauses of U. S. Standard Form No. 23 Contract. Those articles are set out in the Transcript of Record (R., pp. 15-18.) By article, number and title they are the following:

Article 3—Changes

Article 4—Changed Conditions

Article 9—Delays-Damages

Article 15—Disputes.

Even a cursory reading of those articles will serve to convince the reader that, if a contractor would avail himself of his rights under any one of them, he must act promptly and within rigidly restricted time limits. These rigid time limitations controlling effective use of the rights conferred by the respective sections are as follows:

Article 3—Changes: Claim must be asserted *within 10 days* after change is ordered.

Article 4—Changed Conditions: Notice of changed condition must be given *immediately.*

Article 9—Delays-Damages: Notice of Cause of delay must be given *within 10 days.*

Article 15—Disputes: Appeal must be taken *within 30 days.*

It is these rigid time limitations, requiring prompt action by the contractor in the form of the filing of a written claim within a very few days after the happening of a particular event or occurrence, that bring about a long series of separate, individual claims in the course of the performance of a single government contract.

The wary contractor, who would protect his rights, cannot wait to cumulate either his facts, his delays, or his damages. He must file promptly a series of individual, separate claims. They must be filed occurrence by occurrence, change by change, and delay by delay.

An understanding of these exceedingly rigid limitations on the time within which a claim under one of the pertinent contract clauses must be filed exposes as whole fiction the argument advanced by Petitioner (at p. 33 of Brief for U.S.) that:

> ". . . Surely the question of whether a factual dispute is one within the disputes clause should not turn on the kind of damages which a claim seeks. Again, this would give the party asserting the claim the *choice of proceeding administratively or judicially according to the way in which he formulates his claim.*"

There could be no choice, because any portion of a claim that was even close to the border-line of the "Disputes Article" would necessarily have to be filed administratively within ten or thirty days (depending upon the particular contract clause involved). There could be no hanging back on the part of the contractor, while he artfully decided which alternative was best suited to a maximum recovery. The passage of ten days (or thirty)

would eliminate any possibility of a choice of the administrative remedy.

At the least, the contractor would be required to file administratively within ten or thirty days any portion of his overall or total claim that related to any incident that had occurred or of which he had knowledge.

B. The Administrative Process Results in a Determination of the Facts of a Single Claim Within a Narrow, Limited Context That Is Finely-Segmented and Highly-Fragmented.

The inevitable result of this type of administration of contract disputes is the breaking down of a claim that, in normal court litigation, would be presented as one single cause of action, into a series of segmented, fractionalized, individual, separately stated and separately filed claims. They are separately and individually filed, numbered, docketed, and tried.

It is the "Disputes Clause" that provides the mechanics or implementation for the administration of the contract clauses referred to. The purpose is to provide for the contractor a solution that will be quick, fair, and relatively inexpensive. There is strong emphasis upon a speedy determination, since the contractor who files a claim must proceed, during the resolution of the controversy, with the work as ordered.

The strict limitations upon the time within which such claims had to be filed, and the emphasis upon an early resolution of the dispute, were some of the considerations that resulted in the development of an administrative hearing concept in which each claim or appeal was considered and determined separately, and without any rela-

tionship to or joint consideration with any other dispute or appeal, even other claims under the same contract.

This item by item system of considering and resolving claims was so thoroughly embodied in the Government administrative procedure by 1950 that no provision for or recognition of the consolidation of appeals, or even for contemporaneous hearings, was specified under the "Rules of Procedure of the United States Atomic Energy Commission Advisory Board of Contract Appeals" (10 C.F.R., Chapter 1, Part 3) that controlled the administrative hearings under the pertinent Atomic Energy Commission-Utah contract.

This finely-segmented and highly-fragmented characteristic of the administrative hearing under a government contract "Disputes Clause" has been an exceedingly important factor in the development of the severely restricted context or hearing concept under which only the facts that are directly and legally pertinent or relevant to the individual claim are presented, considered and determined.

C. The Administrative Processing of Respondent's "Pier Drilling Claim" Exemplifies the Unsuitability of the Finely-Segmented Hearing Concept to the Determination of a Series of Overlapping or Closely Related Claims.

The administrative practice of resolving disputes on a finely-segmented and highly-fragmented, item by item basis produces some absurd results under contracts where a long series of closely related claims have been filed separately (because of the time limitations), and then are presented and considered independently and without any

relationship to one another, and not even contemporaneously.

This situation is exemplified by the manner in which the Advisory Board on Contract Appeals processed respondent's "Pier Drilling Claim" (Docket No. 87) and "Concrete Aggregate Claim" (Docket No. 121). In its "Finding of Facts and Recommendation" in the "Pier Drilling Claim," (Docket No. 87) [R., pp. 79-93] the Board made references to the facts involved in the "Concrete Aggregate Claim," *which claim it conceded was not before it for consideration.* The Board's discussion of the two claims and their overlapping aspects was as follows:

> "It appears from the record that *serious questions arose as to the quality of the Government furnished aggregate.* This resulted in substantial delays while test samples were poured and tested and while revisions in the proportions of cement and aggregate were decided on. Since the piers in question were the foundation for the entire structure, obviously pouring could not proceed until these matters were settled. *In the opinion of the Board, it was this dispute which delayed construction and not the drilling delays attributable to the 'float rock.'* But the Contractor's claims in the present proceeding are founded on its original letter of June 1, 1953, which referred only to subsurface conditions. While the Board, as indicated at the hearing, construes this letter as sufficient to raise the 'float rock' issue (although with less clarity than could be desired) *it certainly presented nothing as to the aggregate.* In fact, there is no indication that any claim based on the aggregate has been presented to the Contracting Officer. Under these circumstances, *delays or expenses consequent upon the aggregate dispute are not before the Board in this proceeding.*" (R., at p. 90.)

The Board then proceeded to make these "Findings of Fact," among others, in the "Pier Drilling Claim":

> "10. . . . The Contractor, therefore, did encounter changed conditions within the meaning of Article 4.
>
> 11. This changed condition caused some delay in the drilling and excavating operations; *but, because of the delays caused by dispute over the quality of the aggregate, the drilling and excavating delays did not proximately cause delay in the construction of the building or in the final completion of the work.*" (R., pp. 92-93).

As was quoted above, the Board commented on April 30, 1957, that:

> ". . . There is no indication that any claim based on the aggregate has been presented to the Contracting Officer." (R., p. 90).

That statement is absolutely untrue, as is shown by the following portion of the Contracting Officer's determination in the "Concrete Aggregate Claim" (Docket No. 121.)

> "By letter dated July 16, 1956, you presented to me for decision as Contracting Officer under Contract AT(10-1)-645 your claim for additional compensation in the amount of $109,356.00, which sum you represent you were required to expend as a result of the *'Commission's failure to furnish concrete aggregate* that would meet the contract specifications'." (R., p. 52)

So, there was a "Concrete Aggregate Claim" then pending, but as the Board commented:

> "Delays or expenses consequent upon the aggregate dispute are not before the Board in this proceeding." (R., p. 90)

The Board proceeded, then, in its consideration of Docket No. 87, to deny one finely-segmented claim—the "Pier Drilling Claim"—on the basis that the exceedingly costly delays claimed in that docketed claim were caused by the "dispute over the quality of the aggregate", which second separate and finely-segmented claim (Docket No. 121) was not before it for consideration or determination, and which it did not even know was then pending. (Finding 11, R., pp. 92-93)

It must be emphasized that, although the Advisory Board on Contract Appeals conceded that:

> "the delays or expenses consequent upon the aggregate dispute are not before the Board in this proceeding"

it nonetheless actually determined the basic issue in the "Pier Drilling Claim" (Docket No. 87) on the basis of considerations involved in the "Concrete Aggregate Claim" (Docket No. 121), which not only was not before it, but in which no transcript of record was available to it.

No transcript of record was ever prepared on the "Concrete Aggregate Claim" because eventually it was ordered dismissed by a Hearing Examiner for failure to make a timely filing (R., pp. 64-76). No hearing on the merits of that claim was ever held. There is a transcript of record in the "Pier Drilling Claim" hearing.

It needs to be emphasized that the Advisory Board on Contract Appeals, in its consideration of the "Pier Drilling Claim" (Docket No. 87), was adhering to its uniform policy of excluding any evidence that related to the "breach of contract" aspects of the claim. Even so,

in its effort to hear and consider only the evidence pertinent to the request for an "equitable adjustment" it encountered the problem and difficulties related above that resulted from the overlapping nature and the close interrelationship of the "Pier Drilling Claim" and the "Concrete Aggregate Claim."

D. Respondent Is Entitled to a Determination of the Facts of Its Claim for Breach of Contract in a Plenary Hearing Broad Enough in Scope to Allow for the Overlapping and Interrelationship of the Series of Items Constituting the Claims.

It has been developed above that respondent's Petition before the Court of Claims alleges one single, cumulative claim for breach of contract, not a series of severable individual claims. (*Supra* p. 11.) Respondent has not pleaded a series of breaches of contract, but has spelled out in detail the series of acts and omissions which cumulatively constituted a breach of contract on the part of the Government.

As has been demonstrated by the foregoing review of the administrative processing of the "Pier Drilling Claim", some of them overlap and are closely interrelated.

In the instance of the "Pier Drilling Claim" and the "Concrete Aggregate Claim", they overlapped physically, since the work involved in both was performed in the same areas (at least in part). They also overlapped timewise, because the delays incident to each occurred simultaneously (at least as to a portion of each).

That is not unusual on large and complicated construction projects where difficulties have been encountered, and it becomes necessary for the contractor to file a series of

individual claims in order to protect his rights to "equitable adjustment" or for compensation for "any increase of cost."

Respondent's point is that a contractor who has filed and presents to the Court of Claims a claim for breach of contract is entitled to have the facts of his claim heard and determined in an atmosphere and under a hearing concept which provides a plenary hearing broad enough in scope to encompass all phases and details of his claim, including the most important element of providing for the consideration of the overlapping and close interrelationship of the various items making up the claim. Unless a hearing that broad in scope is provided, and unless the facts are considered and determined under a hearing concept that is that plenary, he has in effect had no hearing at all. Without that broad and unlimited a scope to the hearing he has been denied that full and fair hearing that is his right.

It must be obvious that factual determinations could, and normally would, vary greatly under a situation where the scope of the hearing was as narrow and the admissibility of evidence as restricted as in the one single "Pier Drilling Claim", isolated from all of the other administrative claims of respondent, and the condition that would prevail in the Court of Claims, or any other Federal Court, where respondent would be allowed to present any relevant evidence in support of its broad claim for damages for breach of contract. Important differences would result.

The scope of the two hearings would be different: obviously the scope of the trial in the Court of Claims

would be broader and would encompass both issues and evidence that would not be pertinent or admissible under the narrower and more limited scope of the finely-segmented and highly-fragmented administrative hearing.

The evidence admissible would be substantially different. Any evidence that relates in any way to any one *or more* of the individual items or acts pleaded in support of the alleged breach of contract will be admissible in the Court of Claims trial, as contrasted with the narrow evidentiary restrictions of the finely-segmented administrative hearing.

E. The Determination of Factual Issues Pertinent to the "Breach of Contract" Aspect of Respondent's Claim Within the Narrow Context of the Finely Segmented Administrative Hearing Provides Only an Unsuitable, Inadequate Hearing Which Denies Respondent That Full and Fair Hearing Required by Due Process of Law.

Respondent submits that, having pleaded a claim for damages for breach of contract, it was entitled to pursue this remedy directly to the Federal Courts, in this instance the Court of Claims (see *infra*, p. 28), which it did. With its claim for damages properly before the Court of Claims it is entitled to have the facts determined there under a hearing concept that is broad enough to encompass all of the evidentiary details that support every item and facet of its claim.

It is no answer to repeat again and again (as Petitioner does) that this proceeding presents:

> "facts previously determined administratively . . ."
>
> "factual issues previously determined . . ."
>
> "factual issues previously administratively determined . . ."

"factual issues in this case which have previously been administratively resolved . . ." (Brief for U.S., pp. 21-23.)

The deficiency in that reasoning is that those prior determinations (so-called) were made in a hearing context that was finely-segmented and the scope of which was, therefore, narrowly restricted so as not to provide a plenary hearing broad enough in scope to encompass all of the evidentiary matters properly pertinent to the claim for damages for breach of contract.

Evidence that would be properly admissible in the "breach of contract" action was not admissible in the restricted administrative hearing. There was no provision for hearing or considering administratively the overlapping features of other claims or even those portions of claims that were closely inter-related.

Further, respondent is entitled to present in the "breach of contract" trial any evidence that tends to prove that the details of the series of incidents alleged as constituting the breach were such that, when their cumulative or overall effect and implications were weighed, there resulted in the mind of the trier of the facts a conclusion that there was in fact a disregard of Petitioner's contract obligations, and that, therefore a breach of contract had been committed.

Clearly a finely-segmented, narrowly restricted administrative type of hearing would be wholly unsuitable and inadequate to provide even an opportunity for respondent to attempt to make such a showing by proper evidence.

To have determined a fact in the hearing on the "Pier Drilling Claim" cannot possibly be claimed to have pro-

vided respondent an opportunity to make the kind and scope of a factual presentation that it can make under the broad scope of the "breach of contract" trial. The administrative hearing must be held to be unsuitable and inadequate for the factual issues involved in "breach of contract" claims.

To limit respondent to the narrow, fragmented type of hearing provided by the administrative process, and then to hold that, the facts presented there having been determined, respondent may not re-try any of those facts *de novo* in a court trial on a "breach of contract" claim is to deny to respondent that fair and full hearing which due process of law requires.

There is no question that Petitioner contends that the procedure just referred to is the proper one. It states exactly that:

> *"Once the facts underlying either of these legal verbalizations of the claim have properly been determined administratively there is no reason whatever to undertake de novo litigation of those facts* merely because the contractor arrives at a different legal formulation of a claim based on the same facts." (Brief for U.S., p. 25)

F. Respondent's Petition in the Court of Claims Is a Direct Application to the Federal Courts for Unliquidated Damages for an Alleged Breach of Contract, and Is Not a Request for a Review of Any Administrative Determination.

It has been pointed out earlier (*supra*, p. 12) that a careful study of respondent's Petition before the Court of Claims shows that it does not state a request for a *review* of any administrative decision. There is no reference to or request for a review of any administrative decision.

Respondent's Petition is a direct and independent application to the Federal Court, in this case specifically the Court of Claims, for unliquidated damages for an alleged breach of contract.

This proper interpretation and characterization of the Petition before the Court of Claims is particularly important in view of Petitioner's constant reference to the "finality" accorded by the "Disputes Article" and the Wunderlich Act, 68 Stat. 81, 41 U.S.C. 231-232. (Brief for U.S., pp. 21-27.) Typical of Petitioner's many references to this subject is the following:

> "In addition, courts of appeals have also uniformly given administrative findings of fact properly rendered pursuant to the disputes clause the finality accorded by that clause and the Wunderlich Act, regardless of the conceptual nature of the judicial claim involved." (Brief for U.S., pp. 26-27.)

Respondent asserts that Petitioner's analysis and understanding of the Petition before the Court of Claims is erroneous. Its contention as to "finality" of the administrative determination of factual issues is predicated upon a false basis.

Since the proceeding in the Court of Claims on respondent's Petition is a direct, original application, not a request for a review of an administrative ruling, it is submitted that the applicable rules vary materially from those cited by Petitioner as to "finality". Unless and until respondent has been provided a determination of the facts involved in its "Breach of Contract" claim in a plenary hearing broad enough in scope to encompass all phases and facets of its claim, even the overlappings and

inter-relationships of the items making it up, it has been denied that fair and full hearing required by due process of law.

G. To Deny to Respondent a Judicial Trial of Its Breach of Contract Claim, or to Rule That the Court—in This Instance the Court of Claims—May Not Receive Additional Evidence on the Issues Embraced Within the Broad Scope of Such a Trial, Would Constitute a Denial of Due Process of Law.

Respondent here raises specifically the issue of the denial of due process of law if the position of Petitoner should be supported.

A contractor who asserts in the Federal courts—here the Court of Claims—a claim for unliquidated damages for an alleged breach of contract has a right to have his claim considered at a hearing that is fair and full: short of that, he has been denied that procedural or administrative due process of law which is his constitutional right.

Respondent raises the issue of the denial of due process of law because of the effort to compel it to present its "breach of contract" claim in the procedural straitjacket of the finely-segmented, highly-fragmented administrative hearing. As to a "breach of contract" claim such a hearing is, as we have developed above, neither fair nor full.

Pertinent to this point is the comment of Mr. Justice Brandeis in *Akron, C.Y. R'y. Co. v. United States*, 261 U.S. 184, 200; 43 Sup. Ct. 260, 277:

> "Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which

ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

The procedure proposed by Petitioner does not, it is submitted, conform to the standard exacted by this Court, speaking through Chief Justice Hughes in *Morgan v. United States*, 304 U.S. 1, 19; 58 Sup. Ct. 773, 777:

"Congress, in requiring a 'full hearing' had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature. . . . The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

Within the broad principles of due process of law enunciated by those decisions, it is clear that respondent's right to due process of law would be denied should this Court accede to the request of Petitioner, as stated in its "Conclusion" (Brief for U.S., p. 54) that:

"The decision below, permitting a judicial trial on facts relating to the claims in this case, should be reversed."

II. THE "DISPUTES ARTICLE" OF THE CONTRACT DOES NOT PROVIDE THAT ALL FACTUAL MATTERS CONNECTED WITH THE CONTRACT BE DETERMINED BY THE ADMINISTRATIVE PROCESS.

A. Petitioner's Present Position Is That Factual Issues Underlying Breach of Contract Claims Can Be Resolved Under the Standard "Disputes Article."

In the second portion of its Brief, Petitioner argues that claims for breach of contract are disputes concerning questions of fact arising under the contract within the meaning of the "Disputes Article" of U. S. Standard Form No. 23 Contract. It seeks to state its exact position in this respect as adroitly as is possible by emphasizing the factual phase or "factual issues" of breach of contract claims, and ignoring completely, as if they did not exist or were unimportant, the legal issues that are the basic elements of a claim for unliquidated damages arising out of an alleged breach of contract.

Precisely, this is the way Petitioner states its contention:

> "A claim for 'breach of contract' involves an assertion of rights and duties created and defined by the contract. In this case, for example, respondent asserts that the government failed to fulfill duties imposed upon it by the contract. *Since the rights and duties which govern the claim are created and defined by the contract, we believe that the factual disputes pertaining to the claim are disputes 'arising under' the contract amenable to resolution under the standard disputes clause of the contract.*" (Brief for U.S., pp. 29-30)

Proceeding along that line of reasoning, Petitioner next asserts:

> ". . . We believe that the language 'all disputes concerning questions of fact arising under this contract' *can be* applied to facts underlying all asserted rights and duties created by the contract—including the assertion of remedies for 'breach of contract'." (Brief for U.S., p. 30)

The thrust of Petitioner's argument on this point, as well as its weakness, is exposed by another statement that breach of contract claims *"can be"* resolved under the "Disputes Article." This is its repetition of that hope:

> "In our view, questions of fact underlying claims for breach of contract *can be* resolved under the standard disputes clause, at least where those facts (as they are in this case) are of the kind similar to those committed to administrative determination by contract clauses such as those according administrative relief for 'changed conditions,' 'changes' and 'delays-damages.'" (Brief for U.S., p. 28)

B. Petitioner's Present Position Is a Repudiation of the Assertions of the Government at Every Stage of the Administrative Proceedings.

Petitioner's present contention before this Court that claims for breach of contract are disputes arising under the contract within the meaning of the standard "Disputes Article" completely repudiates and seeks to abandon the position asserted by counsel for the Government at every stage of the administrative hearings (as we have demonstrated at pages 6-10, *supra*).

Petitioner's present position is a direct reversal of the Government contention before the Advisory Board on Contract Appeals. Everything that was said there by

counsel for the Government now stands repudiated (see photocopy of the Government's "Motion to Dismiss for Lack of Jurisdiction", Appendix, *infra*).

A reading of the Brief for United States (at pp. 27-54) convinces one that Petitioner's counsel have attempted to justify and rationalize their startling shift in position by allowing themselves to become so enmeshed in the task of reconciling or distinguishing prior precedents (most of which cannot be reconciled) that they have either overlooked or forgotten the rudimentary legal principles and the rather short history of experience that explain and account for the development of the pertinent clauses of the contract.

C. A History of the Purpose and Development of the Pertinent Contract Clauses Demonstrates That Claims for Damages for Breach of Contract Must Be Pursued Directly in the Federal Courts.

More than three-quarters of a century of experience under Government construction and supply contracts had demonstrated that the Government was severely handicapped, in defense and other emergency construction programs, by its inability to make changes in design or changes in the scope of the contract work during the performance of the work without exposing itself to both stoppages of work and long-drawn-out damage suits for alleged breaches of contract.

Similarly, where the site conditions that were actually encountered were not as represented by the plans and specifications, contractors asserted "changed conditions" and threatened to stop work and sue for damages for breach of contract.

To protect the essential Government need to keep these vital construction projects moving, there have been developed a series of standard contract clauses (including Article 3—Changes and Article 4—Changed Conditions) that have conferred upon the Government unusual rights to rewrite a contract during its performance and to do other things which, under any normal contract, would otherwise be viewed as clear breaches of contract. These clauses also made it possible for the Government to keep the work going without interruption on its construction and supply contracts.

The quid pro quo for the contractor was provided in the form of an assurance that he would have the right to an "equitable adjustment" or compensation for "any increase of cost." This right he was given in lieu of the normal right to sue in the courts for damages for breach of contract.

The "Disputes Article" provided the mechanics by which disagreements could be resolved speedily at the administrative level.

Under this procedure that was developed the "equitable adjustment" or compensation for "any increase of cost" was the substitute for the ordinary right to sue for damages for breach of contract. Only in those specific cases where one of the newly-developed clauses provided that the contractor should have the right to obtain an "equitable adjustment" or compensation for "any increase of cost" under the administrative process did he surrender his right to sue in the courts for damages for a breach of contract.

The "Changes clause" (Article 3) provided specifically for an "equitable adjustment". The "Changed Conditions clause" (Article 4) provided for compensation for "any increase of cost."

Significantly, the "Delays—Damages clause" (Article 9) provided neither "equitable adjustment" nor for "any increase of cost." It merely provided for extensions of time for Government-caused delay. Consequently, through the years since these special clauses have been incorporated into standard Government contracts, a contractor who asserted that he had incurred unexpected additional costs because of Government-caused delays was compelled to sue in the courts for unliquidated damages arising out of the alleged breach of contract on the part of the Government. No other form of monetary relief was made available to him by "Article 9: Delays-Damages" or any other clause of the contract. Consequently the "Disputes Article" has not been available in these instances.

That the above recital is a proper interpretation and an accurate, though brief, statement of the history of the development of the pertinent contract clauses is corroborated by the following portion of a current article in 18 Ad. Law Rev. 145, written by one who has participated in the administrative process as a Government representative (Kelly, *Government Contractors' Remedies: A Regulatory Reform.):*

> "Over the years the ASPR Committee has developed, in conjunction with other government agencies, a variety of standard contract clauses that permit the Government to do things as a contracting party that would otherwise constitute a breach of contract. For example, under the 'Changes' clause the Government

may rewrite essential terms of a contract during the course of performance; make design changes, order additional work. Under the Government (Furnished) Property clause the Government may delay the delivery to the contractor of promised government materials necessary for performance. Such extraordinary contractual prerogatives serve the public interest, and the Government is, of course, willing to pay for them. Thus, the variety of special contract clauses I speak of entitle the contractor to an 'equitable adjustment' in his contract price whenever the Government, acting within the scope of these clauses, changes or otherwise fails to live up to the original bargain.

The Disputes procedure implements these clauses. It affords contractors a fair, speedy, and inexpensive method of obtaining resolution of disagreements that may arise in the application of these equitable adjustment provisions. And it assures the Government of uninterrupted performance by the contractor while the dispute is being resolved.

Due to the increasing use of equitable adjustment clauses, and their elaboration by the contract appeals boards (for example, the constructive change order doctrine), it has become difficult for the Government to 'breach' one of its standard procurement contracts. However, *there remain some potential government breaches for which administrative relief under the contract by way of a price adjustment has not been made available. Because they have not been made the subject of a price adjustment clause in the contract, when these government breaches occur and the contractor seeks redress the standard disputes procedure is by definition inapplicable. The boards of contract appeals have no effective jurisdiction, since they are limited by the standard disputes clause to deciding*

contractor claims for which relief is available under the terms of the contract.

These claims that arise outside the contract and are beyond the board's jurisdiction must be pursued by the contractor directly in the federal courts."

D. The Administrative Boards Have Recognized the Distinction Between Disputes "Arising Under" the Contract and Those Which Are "Connected With, But Do Not Arise Under" the Contract.

The administrative boards have generally recognized the distinction between disputes *"arising under"* the contract and those which are *"connected with, but do not arise under"* the contract. With rare exceptions the administrative boards have always conceded that claims for damages for breach of contract were not committed to agency decision under the "Disputes Article."

Petitioner has not been able to cite any respectable or convincing examples of administrative practice in which there has been any departure from the position taken by the Atomic Energy Commission's Advisory Board on Contract Appeals in the *Appeal of Utah Construction Company* (Docket No. 91), which held:

> "It is clear, in the light of the Board's decision in Appeal of Claremont Construction Company (Docket No. 64), that, not only does the Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter 'relating to' and not one 'arising under' the contract. The Board has discussed this distinction at length in both that Claremont case and in Appeal of Frontier Drilling Company (Docket No. 74). The reasoning need not be repeated here. As to this issue, the appeal should

be dismissed as not within the jurisdiction of the Board." (R., p. 149)

The administrative practice has been to recognize a clear distinction between claims *"arising under" and* those *"relating to"* the contract. Petitioner has demonstrated no reason for varying that practice.

E. The Court of Claims in Its Decision in This Litigation, Found No Overwhelming Reason for Making a Drastic Change in Government Contract Law at This Time.

The Court of Claims' decision, both in the majority opinion, and in the concurring portion of Judge Davis' opinion, stressed that the basis of its ruling with respect to respondent's claims was a clear recognition of the delineation between disputed questions "arising under" the contract and those which are "connected with, but do not arise under" it. The following selection from Judge Davis' concurrence states aptly the point of view urged upon this Court by respondent:

> ". . . [T]he finality of such findings has been recognized only when the board was considering a contractor's request under some contract provision (like the Changes, Changed Conditions, Termination for Default or for Convenience, or Suspension of Work articles) expressly authorizing the agency to grant an adjustment in price or other specific relief in defined circumstances. These alone are disputed questions 'arising under' the contract. Exhaustion of the administrative remedy has not been required and *finality has not been accorded where the facts relate to a type of claim, such as for a breach* [fol. 181] *which the contract does not commit to agency determination. Those disputes are connected with, but do not arise under, the contract. The administrative board*

can give no relief under the contract, and therefore cannot finally decide the facts." (R., p. 156.)

Respondent submits that the determination of the Court of Claims was a sound, well-reasoned one, entirely consistent with the purposes of the pertinent clauses of the contract. Petitioner has failed to cite any persuasive reason for reversing the whole history of interpreting the "Disputes Article." As Judge Davis commented:

> "We have been presented with no . . . overwhelming reason for making this drastic change in Government contract law at this time." (R., p. 158.)

F. Respondent Interprets This Court's Decision in the Bianchi Case as Expressly Limited to Matters Within the Scope of the "Disputes Article" of the Contract.

Respondent shares the Court of Claims' view of the limitations upon this Court's decision in *United States v. Carlo Bianchi*, 373 U.S. 709. It is respondent's interpretation that this Court expressly and very carefully limited its ruling there to "matters within the scope of the disputes clause."

Respondent's position before this Court with respect to the application of the *Bianchi* decision (*supra*) to the present litigation is the same as it was before both the Commissioner and the Court of Claims itself. That position was based upon those two selections from the *Bianchi* decision which were quoted by the Court of Claims in the following excerpts:

> "The Supreme Court's opinion in *Bianchi, supra,* restricting the evidence to be considered by this court to the record before the Appeals Board, is expressly limited to 'matters within the scope of the disputes clause.' At page 714 the Court said:

'Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue, as stated *supra*, p. 710, is whether the Court of Claims is limited to the administrative record with respect to that controversy or is free to take new evidence. * * *

It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.'

Finally, in conclusion, the Court said:

'* * * We hold only that in its consideration of matters within the scope of the "disputes" clause in the present case, the Court of Claims is confined to [fol. 171] review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence * * * [373 U.S. 709, 718]'

The opinion of the Supreme Court was thus restricted to 'matters within the scope of the disputes clause.' An action for breach of contract is not within the scope of this clause." (R., pp. 145-146.)

The *Bianchi* decision must be interpreted, it is submitted, as having recognized by its express terms the distinction between "matters within the scope of the 'disputes clause' " and those which are not subject to it.

As has been shown by a brief review of the history of the development of the "Changes clause", the "Changed Conditions clause", the "Delay-Damages clause" and the

"Disputes clause", this distinction is one that is supported both by reason and by fairness to the parties to the contract. It should continue to be recognized and enforced by the Courts.

G. The Answer to Petitioner's Present Position That Questions of Fact Underlying Claims for Breach of Contract "Can Be" Resolved Under the "Disputes Article" Is That It Does Not Authorize Such a Determination.

A thoughtful analysis of the process of reasoning displayed in the "Brief for United States" persuades one to the belief that Petitioner has become so hopelessly bogged down in its effort to cite, and then either to reconcile or distinguish the myriad of individual cases cited therein that in the end its argument leads it into a legal cul-de-sac. Its argument fails to produce, or even to indicate, any real conclusion. It seems, indeed, to end its tortuous legalistic journey asking itself questions. That this is true is exemplified by the following representative excerpts:

> "In our view, questions of fact underlying claims for breach of contract *can be* resolved under the standard disputes clause, at least where those facts (as they are in this case) are of the kind similar to those committed to administrative determination by contract clauses such as those according administrative relief for 'changed conditions,' 'changes' and 'delay-damages.'" (Brief for U.S., p. 28)

and

> "In sum, the administrative practice, like the decisions of the Court of Claims, *does not preclude* an application of the *Bianchi* decision to require administrative submission of factual disputes underlying claims against the government for breach of contract." (Brief for U.S., p. 49)

The obvious answer to these questions that Petitioner is still found asking of itself is that the contract—in the "Disputes Article"—did not provide for such an authority or jurisdiction in the administrative agencies.

It may well be that:

> (1) "questions of fact underlying claims for breach of contract *can be* resolved under the standard disputes clause . . .".

and that

> (2) "the administrative practice, like the decisions of the Court of Claims, *does not preclude* an application of the *Bianchi* decision . . .".

Those possibilities may be true, but the pertinent contract clauses do not, and never have, spelled out authorization that any such jurisdiction should be exercised by the administrative process provided under the "Disputes Article."

Thus, in the end, Petitioner finds itself in the unhappy and inconclusive position of seeking to repudiate a position that the Government and all of its representatives have held fast to at every prior stage of the proceedings.

It now wants to change the rules of decision-making in the middle (approximately) of this lengthy litigation, and it points out "in sum" that what it now desires "*can be*" done under the "Disputes Article" and that the administrative practice to date "*does not preclude*" it.

The clear, irrefutable answer is that the method of decision-making that Petitioner now, for the first time, prefers, was never authorized or provided for by the pertinent contract.

Every administrative or judicial body that has considered the problem in a thoughtful, reasoned manner has rejected Petitioner's present preference. To cite a myriad of cases, to develop that there exist conflicts and contradictions among them, and then to wind up asking questions aloud, which is what Petitioner's Brief does, simply means, as Judge Davis of the Court of Claims commented (R., p. 158), that:

> "We have been presented with no . . . overwhelming reason for making this drastic change in Government contract law at this time."

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision below, permitting a judicial trial according to the order and manner of proof established by the Court of Claims, should be affirmed.

Dated, March 14, 1966 at San Francisco, California.

Respectfully submitted,

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(Appendix Follows)

UNITED STATES ATOMIC ENERGY COMMISSION

HEARING EXAMINER

FOR

CONTRACT APPEALS

DOCKET NO. 121

APPEAL OF	MOTION TO DISMISS
UTAH CONSTRUCTION COMPANY	FOR
UNDER	LACK OF
CONTRACT NO. AT(10-1)-645	JURISDICTION

The Contracting Officer for the United States Atomic Energy Commission (hereinafter referred to as the "Commission"), Idaho Operations Office, Idaho Falls, Idaho, respectfully moves the Hearing Examiner to dismiss for lack of jurisdiction the appeal of Utah Construction Company (hereinafter referred to as the "Contractor") for the reasons that:

1. The Contractor's claim is a claim for damages for breach of contract or breach of warranty.

2. The disputes clause of the subject contract limits the Hearing Examiner's jurisdiction to disputes "concerning questions of fact arising under this contract".

3. A claim for damages for breach of contract or breach of warranty is not a dispute concerning a question of fact arising under the contract.

4. The Contractor's claim may not be recognized as a claim for an equitable adjustment pursuant to Article 4. ("Changed Conditions") of the subject contract.

* * * * * * * * * * * * *

Without prejudice to any other motion the Contracting Officer may present, it is hereby requested that the Hearing Examiner render a decision on this motion prior to taking any other action with respect to this appeal.

Howard K. Shapar
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